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In the Supreme Court of the United States

OCTOBER TERM, 1991

YELLOW FREIGHT SYSTEM, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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10 pp

QUESTION PRESENTED

Whether the court of appeals properly concluded that neither 28 U.S.C. 1738 nor common-law principles of issue preclusion deprive the National Labor Relations Board of the discretion to decline to defer to the factual findings contained in an arbitral award confirmed by a state court, where the arbitrator was not presented with the unfair labor practice issue presented to the Board.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Astoria Federal Sav. & Loan Ass'n v. *Solimino*, 111 S. Ct. 2166 (1991)	11
Botz v. *Helvering*, 134 F.2d 538 (8th Cir. 1943)	10
Garner v. *Teamsters Local Union No. 776*, 346 U.S. 485 (1953)	4
Grand Rapids Die Casting Corp. v. *NLRB*, 831 F.2d 112 (6th Cir. 1987)	8, 13
McDonald v. *City of West Branch*, 466 U.S. 284 (1984)	7
NLRB v. *Heyman*, 541 F.2d 796 (9th Cir. 1976)	12
Olin Corp., 268 N.L.R.B. 573 (1984)	5
Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955)	5
Stephenson v. *NLRB*, 614 F.2d 1210 (9th Cir. 1980)	12
Thomas v. *Washington Gas Light Co.*, 448 U.S. 261 (1980)	10
University of Tennessee v. *Elliott*, 478 U.S. 788 (1986)	6, 9

Constitution, statutes and regulation:

U.S. Const. Art. IV, § 1 (Full Faith and Credit Clause)	10
Labor-Management Relations Act § 301, 29 U.S.C. 185	12
National Labor Relations Act, 29 U.S.C. 151 *et seq.*:	
§ 8(a)(1), 29 U.S.C. 158(a)(1)	5
§ 8(a)(3), 29 U.S.C. 158(a)(3)	5
§ 10(a), 29 U.S.C. 160(a)	7, 8, 10, 11, 12
28 U.S.C. 1738	6, 7, 9, 10, 11

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 930 F.2d 316. The decision and order of the National Labor Relations Board (Pet. App. A18-A43) are reported at 297 N.L.R.B. No. 50.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 1991. The petition for a writ of certiorari was filed on June 13, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Lonnie Bedell was employed by petitioner as a dockworker in Carlstadt, New Jersey. One evening in April 1986 he saw office worker Joann DeGrosa standing in the parking lot and crying. Bedell approached DeGrosa and asked if he could help her. DeGrosa replied that she had been sexually harassed by petitioner's Branch Manager Kenneth Dore and another of petitioner's employees. The next day, Bedell reported the incident to his shop steward. Later that day, Dore approached Bedell and said that the steward had spoken to him regarding Bedell's complaint, that DeGrosa was not a member of the union, and that her allegations therefore were none of Bedell's business. See Pet. App. A2-A3, A22-A23.

The sexual harassment of DeGrosa continued, and petitioner discharged DeGrosa on July 11, 1986. Bedell accompanied DeGrosa to the office of the New Jersey Division of Civil Rights and assisted her in filing sexual harassment charges with the Equal Employment Opportunity Commission (EEOC). He also submitted an affidavit to the EEOC on her behalf. On November 29, 1986, Bedell, in the presence of Operating Manager John McNamara, posted on a union bulletin board a newspaper advertisement promoting a week-long television series on "Sexual Harassment on the Job." As he did so, Bedell told McNamara that Dore and the other employee "shouldn't have done that to [Joann] DeGrosa." Pet. App. A3; see *id.* at A23-A24.

Shortly after posting the advertisement, Bedell's supervisors began to give him more dangerous and arduous assignments, which theretofore had been assigned to employees less senior than Bedell. Bedell continued to be harassed and given undesirable and

demeaning assignments until July 1987, when Dore left his post as supervisor of the Carlstadt facility. In December 1987, Bedell voluntarily transferred to petitioner's new terminal at Elizabeth, New Jersey. After his transfer, Dore, as operations manager of that facility, began imposing on Bedell arduous and demeaning assignments different from those Bedell typically had received before he had assisted DeGrosa. On January 19, 1988, Bedell filed a charge of discrimination with the New Jersey Division of Civil Rights, alleging that petitioner was harassing him because he was assisting DeGrosa in her sexual harassment charge. See Pet. App. A3-A4, A24-A29.

On February 3, 1988, Bedell was assigned to move a large number of heavy cartons from the back of a delivery truck to another point on the shipping dock. Bedell put 15 cartons in one cart and 11 in another and rolled each of these carts several feet away from the truck. As Bedell was in the process of placing the remainder of the cartons in a third cart, Supervisor Joseph Smidt told him to consolidate all of the cartons into two carts. See Pet. App. A4, A29. According to Bedell, he told Smidt that he would follow the order but added "and I am not a piece of shit," to protest the continuous harassment he felt he was experiencing. *Id.* at A4, A30. According to Smidt, when he asked Bedell if he intended to comply, Bedell refused, exclaiming, "because you're a big piece of shit * * * [a]nd you're a scum bag, too." *Id.* at 4; see *id.* at A30. Smidt subsequently testified that Bedell came toward him waving his hands up and down and staring with a crazed look in his eyes. Although Smidt is considerably taller, heavier, and younger than Bedell, and a martial arts expert, Smidt also testified that he nonetheless feared bodily injury be-

cause he had heard rumors that Bedell carried a gun and had used it to threaten others. After the incident, Smidt ordered Bedell to go to Dore's office, asserting that Bedell had disobeyed a direct order and had assaulted him. Petitioner then discharged Bedell. See *id.* at A4-A5, A31-A32.

2. Bedell filed a second complaint with the EEOC and, together with his union (Local 641 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America), challenged his discharge under the contractual grievance procedure set forth in the collective bargaining agreement, which provided for arbitration. At the arbitration hearing, the parties agreed to limit the issue before the arbitrator to whether there was "just cause" for the discharge under the collective bargaining agreement. Pet. App. A5-A6, A38. The arbitrator found that Bedell had not disobeyed a direct order, but denied the grievance because he found that Bedell had assaulted a supervisor. *Id.* at A53. In so finding, the arbitrator generally credited the testimony of petitioner's witnesses (*id.* at A51-A52), and generally found Bedell's testimony implausible. The arbitrator explained (*id.* at A52): "The grievant's credibility was substantially diminished by the fact that he did not previously grieve what he characterized as unfair treatment * * *. If [the prior treatment] was without valid basis, it would constitute harassment which could have been grieved." Bedell and the union appealed the award to the Superior Court of New Jersey, Law Division, Union County (No. L-103501-88). On February 10, 1989, the state court confirmed the arbitrator's award without opinion. *Id.* at A44-A46.

3. Bedell also filed charges with the National Labor Relations Board (the Board), contending that

he had suffered an unfair labor practice. After a hearing, the administrative law judge agreed, concluding that petitioner's discharge of Bedell violated Sections 8(a)(3) and (a)(1) of the National Labor Relations Act (the Act), 29 U.S.C. 158(a)(3) and (a)(1). Pet. App. A20-A43. After hearing testimony from both Bedell and petitioner, the judge found (*id.* at A29-A34) that the alleged assault upon which petitioner based the discharge did not in fact occur, and that petitioner's reliance on the assault as a basis for discharge thus was "pretextual" (*id.* at A35). The judge found that petitioner discharged Bedell because he supported DeGrosa's claim that Dore had sexually harassed her. *Ibid.*

The judge also rejected petitioner's reliance on the arbitration award. Citing the Board's decision in *Olin Corp.*, 268 N.L.R.B. 573 (1984), the judge refused to defer to the award because the discrimination issue had not been before the arbitrator.[1] Similarly, the judge declined to defer to the credibility decisions of the arbitrator because "the conflicting accounts presented to [the judge] for resolution [we]re necessarily enmeshed with the evidence bearing on the EEOC matters." Pet. App. A38-A39. As the judge put it, "[t]o ignore the testimony as to Bedell's aid to De-

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[1] Under *Olin*, the Board generally defers to arbitration awards if (1) all parties have agreed to be bound, (2) the proceedings are fair and regular, (3) the arbitrator's award is not "clearly repugnant" to the Act, (4) the contractual issue is factually parallel to the unfair labor practice issue, and (5) the arbitrator is presented generally with the facts relevant to resolving the unfair labor practice issue. See *Olin*, 268 N.L.R.B. at 574; *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080, 1082 (1955).

Grosa and other EEOC matters is to ignore the whole case." *Id.* at A39. The Board affirmed the ruling of the administrative law judge. *Id.* at A18-A19.

4. The court of appeals enforced the Board's order, rejecting petitioner's contentions that either 28 U.S.C. 1738 [2] or common-law preclusion principles required the Board to defer to the arbitrator's findings. Pet. App. A1-A17.

a. First, the court readily found Section 1738 inapplicable because "[t]he terms of the statute require only *courts* of the United States to give * * * preclusive effect to state court decisions." Pet. App. A9. Noting that this Court held in *University of Tennessee* v. *Elliott*, 478 U.S. 788, 794-795 (1986), that a decision of a state administrative agency was not entitled to preclusive effect under Section 1738 because that agency was not a "court" for purposes of Section 1738, the court concluded that the Board similarly is not a "court" obligated to give preclusive effect under Section 1738. Pet. App. A9-A10. The court also noted that "[t]here are sound policy reasons why the Board should not be constrained by section 1738," *id.* at A10, explaining:

> If section 1738 were applicable to the Board, * * * its effectiveness in remedying unfair labor practices would be dependent upon the states' varying views of claim or issue preclusion. Such a result would compromise the uniformity of

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[2] Section 1738 provides:

> The * * * judicial proceedings of any court of any * * * State * * * shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State.

> rights intended by the passage of the federal labor laws.

Ibid. (citing *Garner* v. *Teamsters Local Union No. 776*, 346 U.S. 485, 490 (1953)).

The court also rejected petitioner's contention that the court of appeals itself must defer to the arbitration award even if the Board is not a "court" obligated to defer to the arbitrator's decision, explaining (Pet. App. A11):

> If a reviewing court must deny enforcement of a Board order whenever its decision relies on facts inconsistent with those earlier found by an arbitrator and upheld by a state court, then we would in effect be forcing the Board to accord issue preclusive effect to the arbitrator's fact-finding. Whatever the merits of such a legal rule, we have already concluded that it cannot be supported by section 1738.[3]

b. The court of appeals also rejected petitioner's contention that, because of the "federal labor policy

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[3] Because the court concluded that the Board was not a "court" under Section 1738, it declined to decide whether the state court's affirmance of the arbitrator's decision was sufficient to make the arbitrator's decision (which by itself would not have been entitled to deference, see *McDonald* v. *City of West Branch*, 466 U.S. 284, 287 (1984)) a state court order entitled to deference under Section 1738. See Pet. App. A8-A9.

The court also found it unnecessary to consider the Board's contention that Section 10(a) of the National Labor Relations Act, 29 U.S.C. 160(a), had exempted the Board from any effect Section 1738 might have had on agencies in general. See Pet. App. A11 n.3. Section 10(a) provides that the Board's power to remedy unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise."

strongly encourag[ing]" arbitration, the court should fashion a common-law rule requiring the Board to give preclusive effect to confirmed arbitration awards. Pet. App. A13. Recognizing that "[f]ederal courts have * * * consistently given highly favorable status to consensual arbitration," *ibid.*, the court nevertheless concluded that the "federal policy to ensure the ability of the NLRB to remedy unfair labor practices" is preeminent. The court of appeals noted that Section 10(a) of the National Labor Relations Act, 29 U.S.C. 160(a), provides that "the Board's power to prevent such practices 'shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise.' " Pet. App. A13.

The court also explained that the Board, "voluntarily and as a matter of its own discretion," has adopted a policy under which it will defer to an arbitrator's award (Pet. App. A14; see note 1, *supra*), and that petitioner did not contend that the Board's policy required that it defer to the arbitrator's decision. Petitioner nevertheless contended that in considering the merit of the charges, the Board should be required to defer to the arbitrator's factual finding that Bedell assaulted his supervisor. Quoting the Sixth Circuit's decision in *Grand Rapids Die Casting Corp.* v. *NLRB*, 831 F.2d 112, 116 (1987), the court agreed with the Board that "[i]t makes little sense to defer to the arbitrator's specific factual findings where deference overall was refused because of the inadequacy of the factual presentation to the arbitrator." Pet. App. A15.[4]

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[4] On July 24, 1991, this Court denied petitioner's application for a stay of the court of appeals' judgment pending disposition of the petition for certiorari.

ARGUMENT

1. Petitioner first contends (Pet. 9-20) that the court of appeals erred in concluding that 28 U.S.C. 1738 does not require the Board to defer to the arbitrator's findings. The language of the statute belies petitioner's contention. That statute requires full faith and credit only "in every court within the United States." Because the Board plainly is an administrative agency and not a court, the court of appeals correctly concluded that Section 1738 does not apply.

As the court of appeals noted, this reading of Section 1738 is bolstered by this Court's analysis in *University of Tennessee* v. *Elliott*, 478 U.S. 788 (1986). In that case, this Court concluded that the decisions of state administrative agencies are not entitled to preclusive effect under Section 1738 because those agencies are not "courts." It would be highly irregular to conclude that a state administrative agency is not a "court of [a] State" whose decisions are entitled to preclusive effect, but to interpret the phrase "court within the United States" in the same sentence to include federal administrative agencies. The court of appeals correctly rejected this argument. And it properly rejected petitioner's argument that even if "the Board is not statutorily required to defer to the arbitrator's fact-finding, the same statute works to deny enforcement of its orders whenever it fails to so defer." Pet. App. A11. As the court said, there is no good reason to "accept this effort to effect indirectly what cannot be accomplished directly." *Ibid.*[5]

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[5] This case would be a particularly poor vehicle to decide whether Section 1738 requires a federal agency to defer to

Nor is there merit in petitioner's assertion (Pet. 12-14) that the decision of the court of appeals conflicts with *Botz* v. *Helvering*, 134 F.2d 538 (1943), or with *Thomas* v. *Washington Gas Light Co.*, 448 U.S. 261 (1980). In *Botz*, the Eighth Circuit held that the Board of Tax Appeals (the predecessor to the United States Tax Court) was *not* obligated to defer to a judgment of a state court because the Commissioner was not a party to the judgment and because the judgment was obtained through fraud. Nothing in the decision supports petitioner's contention that Section 1738 requires administrative agencies to defer to the decisions of state courts. In *Washington Gas Light*, this Court held that the Benefits Review Board in the District of Columbia was *not* obligated to defer to the decision of a Virginia workers compensation tribunal. The issue raised by petitioner was not discussed in any of the opinions in that case, which focused on the singular jurisprudence this Court has produced with regard to the applicability of the Full Faith and Credit Clause to workers compensation awards.

In sum, no court has ever held that Section 1738 requires a federal agency to grant preclusive effect to a state court judgment. In the absence of a conflict, this issue does not warrant further review.

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factual findings made in an arbitral award confirmed by a state court, because of the unusually broad statutory authority granted to the Board by Section 10(a) of the National Labor Relations Act. See note 3, *supra*. It is, moreover, not at all clear that a judgment such as the one here would be entitled to preclusive effect even in a state court. See *ibid.*

2. Petitioner also contends (Pet. 21-29) that, even if Section 1738 does not require the Board to grant preclusive effect to the arbitrator's rulings, this Court should fashion common-law preclusion principles requiring the Board to give preclusive effect to the arbitrator's findings. This contention is meritless. To be sure, courts generally presume that Congress expected that common-law rules of preclusion would apply to an administrative agency acting in a judicial capacity. See, *e.g.*, *Astoria Federal Savings & Loan Ass'n* v. *Solimino*, 111 S. Ct. 2166, 2169-2170 (1991). But this "presumption * * * is * * * properly accorded sway only upon legislative default, applying where Congress has failed expressly or impliedly to evince any intention on this issue." *Id.* at 2170.

In this case, Congress has addressed the issue, by enacting Section 10(a) of the National Labor Relations Act (29 U.S.C. 160(a)), which grants the Board the power to prevent and remedy unfair labor practices and provides that the Board's power to do so "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." The issue-preclusion rule sought by petitioner is contrary to Section 10(a), because it would prevent the Board from remedying an unfair labor practice because of the parties' private adjustment of a related contractual dispute. Petitioner fails to take account of the significance of the Board's key role in enforcing national labor policy. The Board was not a party to the earlier proceedings; it would be anomalous to conclude that it is prevented from remedying an unfair labor practice solely because of the results of grievance arbitration proceedings regarding the meaning of a private contract.

Thus, the court of appeals correctly concluded that Section 10(a) evidences Congress's intent that the Board need not defer to the findings of an arbitrator interpreting a collective bargaining agreement.[6]

Finally, petitioner contends that, even if the Board was not obligated to defer to the arbitrator's entire decision, it was obligated to defer to the arbitrator's factual finding that Bedell assaulted his supervisor. See Pet. 27-29. But as the court of appeals and the administrative law judge both noted, the credibility determinations involved in resolving that factual question were "necessarily enmeshed" with Bedell's protected activity and any animus his employer may have had against it. Pet. App. A16 (quoting *id.* at A39). Although "[t]he motivations and the credibility of the parties * * * take on an entirely new light once the additional facts related to the unfair labor practice charge are introduced, * * * the arbitrator never

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[6] Petitioner contends (Pet. 10 n.5, 21-26) that the situation presented here—in which an arbitrator's award has been confirmed by a state court—is controlled by the principle of collateral estoppel established in *NLRB* v. *Heyman*, 541 F.2d 796 (9th Cir. 1976). But, as the Ninth Circuit itself has recognized implicitly, *Heyman* is irrelevant in this context. *Heyman* dealt with the collateral estoppel effect in a subsequent Board proceeding of a finding of fact made by a federal district court adjudicating an action under Section 301 of the Labor-Management Relations Act, 29 U.S.C. 185; the preclusive effect of a finding made by a court exercising its jurisdiction to decide claims that are governed by federal labor policy is a decidedly different question from the preclusive effect of a decision confirming an arbitral award based entirely on contractual interpretation. See *Stephenson* v. *NLRB*, 614 F.2d 1210, 1216 n.4 (9th Cir. 1980) (declining to require the Board to give preclusive effect to an arbitral decision; noting that *Heyman* was "clearly distinguishable").

heard much of the evidence of Dore's harassment of Bedell in retaliation for Bedell's assistance of DeGrosa." *Id.* at A15. Thus, it "makes little sense to defer to the arbitrator's specific factual findings where deference overall was refused because of the inadequacy of the factual presentation to the arbitrator." *Ibid.* (quoting *Grand Rapids Die Casting Corp.* v. *NLRB*, 831 F.2d 112, 116 (6th Cir. 1987)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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